for Enron was the business circumstance that caused Andersen's mass layoff. (Pet. App. 6) On February 22, 2002, the DOJ told Andersen that an indictment was highly likely. On March 1, the DOJ formally notified Andersen that it intended to seek an indictment. The indictment was filed on March 7 and unsealed on March 14, 2002. Only on April 8, 2002 did Andersen first give notice to its employees of a mass layoff beginning on April 23, 2002.

The majority found that the indictment was not reasonably foreseeable on February 22, 2002, sixty days before the inception of the mass layoff on April 23, 2002. However, the majority, together with the dissent, found that "Andersen could have reasonably foreseen the indictment by March 1 – the date it was told by the DOJ that it was being indicted" or on March 14, the date the indictment was unsealed. (Pet. App. 7, 10, 13, 15)

Although the majority and the minority agreed that the indictment was reasonably foreseeable on March 1, 2002, fifty-three days before the mass layoff, the majority held that Andersen did not violate the WARN Act when it did not give notice until April 8, 2002, fourteen days before the mass layoff. (Pet. App. 8-11) The majority's holding was error. The majority effectively interpreted § 2102(a) of the Act as an all or nothing requirement, *i.e.*, notice is required only if a mass layoff is reasonably foreseeable sixty or more days before the layoff. If a mass layoff is only reasonably foreseeable, say, fifty-nine days before its inception, the employer is exempt from giving its employees WARN Act prescribed notice and benefits. The majority's holding is inconsistent with the language and purpose of the Act and conflicts with the position of at least one other circuit.

The unforeseen business circumstances exception does not exempt an employer from giving any notice at all to its employees of an impending mass layoff. The exception merely states that an employer can order a mass layoff "before the conclusion of the 60-day period if the . . . mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). (Pet. App. 37) The exception assumes that the employer has already given notice and that unforeseen circumstances preclude it from giving its employees the full sixty days to look for another job. The Act requires, therefore, an employer who is forced to give less than sixty days notice to "give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period." 29 U.S.C. § 2102(b)(3). (Pet. App. 38)

There is nothing in the language and purpose of the Act which indicates that an employer, who due to unforeseen circumstances orders a mass layoff before the sixty days has expired, need not give any notice at all. The dissenting judge stated the correct rule, namely that the "60-day period is merely reduced, not eliminated, when the necessity for a mass layoff or plant closing becomes apparent within that time period." (Pet. App. 14)

As the dissenting judge noted as well (Pet. App. 14), the majority's opinion creates a conflict with other circuits. For example, in *Burnsides v. M.J. Optical, Inc.*, 128 F.3d 700 (8th Cir. 1997), the court held that unforeseen circumstances precluded the failing defendant employer from giving sixty days notice of a plant closing. *Burnsides*, 128 F.3d at 703. However, the *Burnsides* court held that the defendant employer had to pay damages for the period of time in which it was aware of the need to close the plant

but failed to give its employees notice of that fact – a period of two days. *Burnsides*, 128 F.3d at 704; *see also Hotel Employees and Restaurant Employees Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 187 (3d Cir. 1999) ("in the event that an unforeseeable business circumstance arises, the notice period may be reduced or eliminated."); *Halkias v. General Dynamics Corp.*, 137 F.3d 333 (5th Cir. 1998).

If notification is not required for a reduced period, then the provision requiring "a brief statement for reducing the notification period" is nullified. A reduced notification period is necessary to meet and advance the purposes of the WARN Act. The Act was enacted to protect workers and their families and communities from the deleterious effects of sudden mass layoffs by providing employees with notice of termination and continuation of wages and employment benefits during the required notice period. 20 C.F.R. § 639.1. (Pet. App. 45) The Act does not require notification more than sixty days in advance of the layoff. The sixty day provision is a ceiling, not a floor, on the employer's requirements and liability. If the layoffs become reasonably foreseeable more than sixty days in advance, only sixty days notice and benefits are required. But, if the layoffs become reasonably foreseeable less than sixty days in advance, notice must be given on the date they are reasonably foreseeable. The notice and benefits for a reduced period are important to the employees for the reasons the WARN Act was adopted. This is shown by the reference to "reducing the notification period."

C. If Notice Cannot Be Practically Given At Time Of Reasonable Foreseeability Then Employees Are Entitled To Back Pay And Benefits For The Time Of Delay

The majority found that layoffs were reasonably foreseeable on either March 1, when Andersen was told by the DOJ that it would be indicted, or March 14, when the indictment was publicly announced by the DOJ. But the majority then held that notice was not required until April 8, the very day the layoffs were announced.

The majority gave two reasons for its holding, neither of which was supported by any authority. First, the majority held that, although layoffs were reasonably foreseeable on March 1, "*hope* still remained that the dreaded act could be stalled if not avoided." (Pet. App. 7, emphasis added) The majority also worried that giving notice would cause the collapse that Andersen hoped could be avoided. (Pet. App. 8)

The majority's first reason is a complete reversal of the statutory standard. Under the Act, an employer does not have to give notice if there is only a possibility of layoffs. Under the majority's opinion, the employer does not have to give notice if there is even a slim hope or possibility that the reasonably foreseeable layoffs can be avoided.

Moreover, the Act itself provides the solution to the problem that giving the notice may have hastened the collapse that Andersen was so hoping to avoid. Employers who violate the WARN Act are required to pay their employees back pay and benefits for each day that the notice requirement is violated. 29 U.S.C. § 2104(a)(1). (Pet. App. 40) If Andersen was afraid that its business would

collapse merely by giving its employees notice of a mass layoff due to a reasonably foreseeable indictment, then Andersen was free to refrain from giving that notice so long as it was willing to provide its employees with back-pay and benefits for each day that it delayed giving notice. Thus, if there is a 90% chance of indictment, the WARN Act does not require Andersen to give up its 10% hope of avoidance by giving notice. But, when the indictment is finally unsealed, Andersen must pay benefits from the date of reasonable foreseeability.

The majority's second reason for holding that Andersen did not violate the Act when it did not give notice until April 8, 2002 is also unsupported by any authority. Andersen argued below that it did not have to give its employees notice until it knew exactly which employees were going to be terminated. According to the majority, after March 14, when the indictment was announced, Andersen "needed a little time to assess how things would shake out. And it was not unreasonable for the company to think it could survive the carnage until early April. . . . " (Pet. App. 10)

The majority's second reason is also utterly unsupported by the record. Andersen argued vociferously and repeatedly to the DOJ that an indictment would be the death knell for the firm. After being informed by the DOJ on February 22 that it was considering indicting Andersen, for the next 10 days Andersen engaged in a concerted effort to dissuade the DOJ from bringing an indictment. Andersen argued, *inter alia*, that indictment would constitute a "death sentence," that it would cause the firm's "rapid," if not "almost immediate," collapse. Andersen knew on March 14 that it could not survive. It did not need until April 8 to assess the situation.

The WARN Act requires employers relying on the unforeseen business circumstances exception to give as much notice as is practicable. Neither the Act nor case law support the majority's holding that an employer is entitled to give notice only after it has decided exactly which employees it intends to layoff. The decision of the court of appeals should be reversed.

CONCLUSION

The correct interpretation of the WARN Act, an important employee protection statute, is vital to the thousands of employees who lose their jobs every year due to plant closings and mass layoffs. The Seventh Circuit majority's holding below effectively eviscerates this Act and creates a conflict with at least the Eighth Circuit. For these reasons, and the reasons stated above, petitioners respectfully request that this Court grant their petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 04-1616 & 04-1838

NANCY J. ROQUET and CORETTA ROBINSON

Plaintiffs-Appellants,
Cross-Appellees,

v.

ARTHUR ANDERSEN LLP,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No 02 C 2689 – **John W. Darrah**, *Judge*.

ARGUED OCTOBER 28, 2004 – DECIDED FEBRUARY 9, 2005

Before RIPPLE, WOOD, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. This case involves the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109, better known by its shortened name, the WARN Act. The Act became law in 1989, and its purpose is to soften the economic blow suffered by workers who unexpectedly face plant closings or mass layoffs. Among other things, the Act requires that companies subject to its

reach (generally large employers) give employees 60 days notice in advance of any mass layoffs or plant closings. The notice gives affected workers a little time to adjust to a job loss, find new employment, or, if necessary, obtain retraining.

Our case, however, is not your typical WARN Act fare as it involves hot-button topics like "Enron," "document shredding," and "indictment." And it concerns an exception to the WARN Act's notification requirement: the Act's 60-day-notice obligation is eliminated, or reduced to a shorter term, if a mass layoff or plant closing is "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." *Id.* § 2102(b)(2)(A). The defendant here, the giant accounting and consulting firm Arthur Andersen LLP, convinced the district court that its failure to comply with the Act was excused by the exception we just quoted. The plaintiffs, a purported class of former Andersen employees, are here challenging that decision on appeal.

First, a little background. As of early 2002, Andersen had over 27,000 employees in 80 locations throughout the country. In addition to providing direct accounting and consulting services for clients, Andersen performed administrative support services for approximately 80 international practice firms that used the Andersen name. One of the firm's major clients was the Enron Corporation, the infamous Houston, Texas, energy marketer that fell like a house of cards in 2001 when it came to light that the company had grossly misstated its earnings. Andersen was at the center of Hurricane Enron – it audited the company's publicly filed financial statements and provided internal counseling. *See United States v. Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004).

In November of 2001, Andersen received bad news in the form of a subpoena from the SEC requesting Enron-related documents. During the course of its investigation, the SEC discovered that Andersen employees destroyed thousands of relevant documents in the 6 weeks leading up to its receipt of the subpoena. Over the next few months, the media began to speculate about Andersen's continuing viability. Stories also circulated that Andersen's employees were concerned about layoffs and that some of the company's clients were contemplating defection.

During this time, Andersen worked hard to try to resolve its Enron-related ills with the SEC and the Department of Justice (DOJ). As of February 22, 2002, Andersen had not suffered a significant loss of business nor was it giving any thought to a mass layoff. That day, Andersen's lawyers met with lawyers from the DOJ. The next day, counsel briefed Andersen's management team, and a participating manager e-mailed the following update to employees:

> At our meeting on Saturday, February 23, the current status of the investigation into document destruction was presented by the outside lawyers from Davis Polk. They are moving forward as quickly as possible to bring this matter to a conclusion as it relates to the Firm with the Department of Justice. Our desired timetable is to be in a position at the end of February to have the desired conclusion and an agreement in principle with the DOJ, so that we can finalize our disciplinary actions and prepare an internal announcement followed closely by a public announcement of the resolution of this investigation.

Discussions continued over the next few days.

On March 1, the DOJ delivered dire news – it was going to seek an indictment of the company. Andersen tried to convince the DOJ to change its mind, but to no avail. On March 7, an Andersen managing partner, Terry Hatchett, sent an e-mail informing employees that the firm was "presently engaged in discussions with the Department of Justice regarding the parties' respective views" and that "[n]o final conclusions have been reached." That very day, however, the DOJ filed a sealed indictment charging the firm with obstructing the SEC investigation by destroying and withholding documents (18 U.S.C. § 1512(b)(2)). On March 13, Andersen's lawyers asked the DOJ to defer prosecution of the company and focus instead on culpable individual employees. The DOJ refused to budge, and on March 14 the indictment was unsealed.

To the surprise of no one, news of the indictment triggered massive client defection. From March 15 to the 31st, Andersen lost $300 million in business. During this time period, the practice group on West Monroe Street in Chicago alone lost $57 million, roughly 14 percent of its fees. To put the gravity of these losses in perspective, the firm had lost only $5 million, or 1 percent, in the 10 weeks preceding the indictment. On March 28, Andersen announced that it was eliminating support services for its international network, which would result in additional revenue loss.

In light of these setbacks, and with additional hemorrhaging expected, Andersen decided to lay off thousands of employees. On April 8, management at West Monroe gave notices of termination to 560 employees, including Nancy Roquet and Coretta Robinson, the named plaintiffs in this suit. After receiving notice, Roquet remained on the payroll for 2 weeks and Robinson for 5 weeks. Andersen

also made major cuts at its North Michigan Avenue site in Chicago as well as at its training facility in St. Charles, Illinois.

Roquet and Robinson filed a class-action complaint in federal district court alleging that Andersen violated the WARN Act by failing to give 60 days notice to its workers before laying them off. They sought back pay and lost benefits. In August of 2002, the court certified a class consisting of workers from the two Chicago sites and the St. Charles facility. Both sides eventually moved for summary judgment on the issue of whether Andersen's workforce reduction qualified as a "mass layoff" under the Act. The court concluded that it did and granted the plaintiffs' motion.

The parties then moved for summary judgment on the question of whether Andersen was exempt from liability under the WARN Act's "unforeseen business circumstances" exception. The district court concluded that the need for layoffs was not reasonably foreseeable 60 days before the decision was made and entered summary judgment in favor of Andersen. The plaintiffs appeal that decision, which we review *de novo*.

In evaluating this appeal, we note that the Department of Labor has provided some guidance regarding when the "unforeseen business circumstances" exception applies. In doing so, however, the agency eschewed *per se* rules and instead encouraged a case-by-case examination of the facts. *See Pena v. Am. Meat Packing Corp.*, 362 F.3d 418, 421 (7th Cir. 2004). A business circumstance may be reasonably unforeseeable if it was caused by some sudden, dramatic, and unexpected action, or by conditions outside the employer's control. 20 C.F.R. § 639.9(b)(1). When

determining whether a mass layoff was caused by unforeseeable business circumstances, courts evaluate whether a similarly situated employer exercising reasonable judgment could have foreseen the circumstances that caused the layoff. *Id.* § 639.9(b)(2). Thus, a company will not be liable if, when confronted with potentially devastating occurrences, it reacts the same way that other reasonable employers within its own market would react. *Watson v. Mich. Indus. Holdings, Inc.*, 311 F.3d 760, 765 (6th Cir. 2002); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1061 (8th Cir. 1996).

The parties dispute whether Andersen established either element of the exception – causation and foreseeability. *See Jurcev v. Cent. Cmty. Hosp.*, 7 F.3d 618, 622-27 (7th Cir. 1993). The district court concluded that the need for mass layoffs was caused by the public announcement of the indictment on March 14. We agree. Up until then, Andersen suffered no marked loss of business despite a spate of negative publicity. It is clear that economic hemorrhaging really did not begin until word of the indictment got out. The plaintiffs contend that Andersen's felonious misconduct caused the layoffs, not the indictment. But, while it is true that the illegal acts of some Andersen employees were the root cause of the firm's ultimate downfall, not until the indictment became public did it feel the pain. Had the DOJ indicted only individual Andersen employees instead of the firm as a whole, or targeted only the Houston office, the layoffs here may never have occurred.

The heart of the dispute in this case centers on foreseeability. In determining whether a crippling business circumstance is foreseeable, we must bear in mind that "it is the 'probability of occurrence that makes a business

circumstance "reasonably foreseeable,"' rather than the 'mere possibility of such a circumstance.'" *Watson*, 311 F.3d at 765 (quoting *Halkias v. Gen. Dynamics Corp.*, 137 F.3d 333, 336 (5th Cir. 1998)). The layoffs began on April 23, which means that Andersen was required to notify employees 60 days earlier, or February 22. The plaintiffs argue that the indictment was reasonably foreseeable on that date because "the DOJ disclosed to Andersen that an indictment was highly probable." But the record does not support this position. The plaintiffs point to Andersen's meeting with the DOJ on February 22 and its subsequent efforts to fight off an indictment. The February 23 e-mail summarizing that meeting, however, makes no mention of the firm being indicted. And Andersen's subsequent negotiations with the government do not mean that it knew an indictment was likely. Possible? Certainly. But probable? No. *See Halkias*, 137 F.3d at 336 (business circumstances triggering layoff must be "probable" to be reasonably foreseeable; a lesser standard of "possibility" would be impracticable). Indeed, as of February 22 it was not a foregone conclusion that Andersen would be indicted as a company – in the past, the government typically went after culpable individuals, not companies as a whole.[1] By all accounts, this was an unusual move by the DOJ. There is evidence in the record suggesting that Andersen could have reasonably foreseen the indictment by March 1 – the date it was told by the DOJ that it was being indicted. But hope still remained that the dreaded act could be stalled if not avoided.

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[1] This rather unprecedented step will be considered soon by the Supreme Court, which just recently agreed to consider whether indicting (and convicting) the company as an entity was a proper application of 18 U.S.C. § 1512(b)(2).

We believe that a reasonable company in Andersen's position would have reacted as it did. Confronted with the possibility of an indictment that threatened its very survival, the firm continued to negotiate with the government until the very end and turned to layoffs only after the indictment became public. The plaintiffs argue that Andersen should have notified employees of layoffs on February 22. We do not agree. At that point, Andersen had not yet lost business or been indicted. Indeed, in our view, a mass layoff at that point would have been a poor business decision. What if the government decided not to indict the firm as a whole, or waited 6 months to make the decision? The only reason for providing notice so early would be to ward off potential WARN Act liability. But, as the Sixth Circuit explained in *Watson*, the WARN Act is not intended to deter companies from fighting to stay afloat:

> WARN was not intended to force financially fragile, yet economically viable, employers to provide WARN notice and close its doors when there is a *possibility* that the business may fail at some undetermined time in the future. Such a reading of the Act would force many employers to lay off their employees prematurely, harming precisely those individuals WARN attempts to protect. A company that is struggling to survive financially may be able to continue on for years and it was not Congress's intent to force such a company to close its doors to comply with WARN's notice requirement.

311 F.3d at 765. These same concerns were at play here. Thus, Andersen's failure to notify employees earlier than it did was not unreasonable.

The plaintiffs argue that the layoffs were foreseeable as a matter of law under 20 C.F.R. § 639.9(b)(1) because the indictment was not sudden, dramatic, and unexpected nor outside the employer's control. In their view, Andersen was long aware of its misconduct, and punishment for that misconduct was inherently foreseeable. But the indictment was certainly sudden and dramatic in that Andersen did not know if it would be indicted as a firm. Nor did Andersen really know when the indictment would be returned until the act occurred. Again, the WARN Act deals in reasonable probabilities, not possibilities. Moreover, an employer does not have to be caught completely off guard by a dire business circumstance for it to be "sudden, dramatic, or unexpected." Case law reveals that WARN Act defendants need not show that the circumstances which caused a plant closing or mass layoff arose from out of the blue to qualify for the exception. *See Jurcev*, 7 F.3d at 626 (hospital entitled to the exemption despite awareness of precarious financial condition and potential loss of funding which ultimately led to its closing); *Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 186 (3rd Cir. 1999) (casino owner entitled to exception where it could not be sure if or when gaming commission would revoke its license); *Loehrer*, 98 F.3d at 1062 (defense contractor exempt despite being aware that government might cancel bomber/fighter contract).

Our dissenting colleague tells us that "Andersen knew enough 'long before' April 8, 2002, to give the required statutory notice to its employees." (We've added the internal quotation marks.) That's an odd statement, for the statutory notice requires 60 days, and the dissent goes on to tell us in the same paragraph that the "impending catastrophe was not foreseeable as of February 22, 2002. So, by that count

alone, "long before" April 8 (when notice was given) is at best 45, not 60, days. And "long before" eventually becomes shorter still as the dissent settles on March 1, 38 days before the April 8 notice actually went out, as the trigger date. While we concede that an argument could be made that March 14, the date the indictment was unsealed, *could* be viewed as a WARN Act trigger date (which would further shorten the "long before" window to 25 days), we don't think it should be so viewed. We think the company, faced with this unprecedented cataclysmic event, reasonably needed a little time to assess how things would shake out. And it was not unreasonable for the company to think it could survive the carnage until early April, when on the 8th it ran up the white flag of surrender and gave the bad news to its employees.

The lead time in the notice Andersen ended up giving varied from employee to employee. Our two named plaintiffs, for example, got 2 (Roquet) and 5 (Robinson) weeks notice before they were out of work. Given the situation here, and the "business circumstances" exception in § 2102(b)(2)(A), Andersen, although deserving of no roses for the acts of some of its agents in the Enron mess, did not violate the WARN Act by giving the notice as it did on April 8.

We also reject the notion that the timing of the notice was under Andersen's control. The plaintiffs are confusing Andersen's responsibility and culpability for its misbehavior with its "control" over the indictment within the meaning of the regulation. Stated simply, Andersen could not indict itself. Andersen was not like a company that secretly plotted for a long time to move its operation to Mexico and closed up shop without any notice to its employees.

Andersen has appealed the district court's entry of summary judgment for the plaintiffs on the question of whether its workforce reduction constituted a "mass layoff" under the Act. But because we agree with the court's dismissal of the suit under the WARN Act's "unforeseen business circumstances" exception, we need not address the contention.

The judgment of the district court is AFFIRMED.

WOOD, Circuit Judge, dissenting.

No one could dispute the majority's observation that the layoffs involved in this case were high-profile. The pages of the country's newspapers in 2001 and 2002 were filled for weeks, if not months, with the unfolding Enron story and the role that Enron's advisors, including Arthur Andersen, played in that saga. Nonetheless, the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109, (the WARN Act) applies to all cases, not just to those that are dull enough to stay below the press's radar screen. The majority finds here that Andersen was entitled to take advantage of the unforeseen circumstances exception to the obligation to notify affected workers 60 days prior to a mass layoff or plant closing. In so holding, it either finds that notice was impossible right up to April 8, 2002, when the employees finally received the bad news, or it finds that the statute as a matter of law takes an all-or-nothing approach – if 60 days' notice is impossible, then no notice at all is required. Neither one of those possibilities is correct, in my opinion; the first fails as a matter of fact, and the second as a matter of law. I would find that notice was possible, and thus required, no later than

March 1, 2002, and I would remand for further proceedings on that basis.

First, a review of the facts shows that Andersen knew enough long before April 8, 2002, to give the required statutory notice to its employees. Plaintiff Nancy Roquet remained on the payroll for two more weeks, until April 23, which was the date when the mass layoffs began. Under the statute, therefore, she and the many other Andersen employees in her position should have received notice of their terminations no later than February 22, 2002, assuming critically that Andersen realized that the firm was about to crumble. Although the plaintiffs have argued strenuously that Andersen knew enough as of that date to trigger the notice obligation, I agree with the majority that the impending catastrophe was not foreseeable as of February 22, 2002. At that point, despite the negative Enron publicity, Andersen had not experienced a significant loss of business. Its lawyers advised it on February 23 that they were moving quickly to a resolution of the matter with the Department of Justice (DOJ). The tone of the e-mail sent to the employees, reproduced *ante* at 3, suggests that the firm believed that some heads would roll, but that the firm itself would carry on.

This relatively positive outlook was shattered on March 1, when the DOJ informed Andersen that it was about to be indicted. No one could have been in any doubt about the grim prospects the firm faced after indictment. Such a drastic step was close to unprecedented, as the many articles commenting on it after-the-fact observed. See, *e.g.*, Editorial, *Frontier Justice*, WALL ST. J., March 18, 2002; James O'Toole, *Spreading the Blame at Andersen*, N.Y. TIMES, March 26, 2002, at A25. (Indeed, the Supreme Court has just granted *certiorari* in Andersen's

criminal case, indicating that it is yet to be determined whether the firm should have been convicted). See *Arthur Andersen LLP v. United States*, No. 04-368, *cert. granted*, 125 S. Ct. 823 (Jan. 7, 2005.) Even though Andersen made a last-ditch effort to persuade DOJ to change its mind, it knew that it was in serious trouble. The DOJ does not lightly tell firms that a grand jury is about to indict them, after all. Under the WARN Act, this was enough to trigger its legal obligation to give notice to its employees. By this time, to put the point in terms of the statutory exception to the 60-day rule, it was at least "reasonably foreseeable" to the firm that the closing or mass layoffs would occur. This does not mean, in my view, that Andersen had to tell its threatened employees the reason why such a drastic restructuring was possible; it simply had the obligation to tell them that their jobs were at risk. And indeed those jobs were at risk: on March 7, as promised, DOJ filed a sealed indictment charging the firm itself with obstruction of justice. A week later, on March 14, the indictment was unsealed. Predictably, the news of the indictment dealt a body-blow to the firm, as the majority has recounted. Facing massive losses in business, Andersen gave notice to 550 of its employees on April 8 that they were going to be terminated; a short two weeks later, the departures began.

The facts simply cannot bear the interpretation that the necessity for mass layoffs was not reasonably foreseeable prior to April 8. Thus, if this is the true rationale of the majority's opinion, I cannot subscribe to it. It is also possible, though by no means necessary, to read the majority's opinion as holding that if the need for the layoffs was not reasonably foreseeable at the 60-day mark (February 22), then no notice at all was required by the statute. In *Pena v. American Meat Packing Corp.*, 362 F.3d

418 (7th Cir. 2004), this court left open the question whether a sufficient unforeseen circumstance occurring within the 60-day window excuses an employer from providing any notice at all, or if instead it merely reduces the amount of notice required. See *id.* at 422 ("Further, if the conditions were unforeseeable, it is unclear whether this qualifies AMPAC for merely a reduction in its required notice period or the complete elimination of it.").

In my view, we should reach that question in the case before us. Taking into account the language and purpose of the WARN Act, we should hold that the 60-day period is merely reduced, not eliminated, when the necessity for a mass layoff or plant closing becomes apparent within that time period. Indeed, immediately after describing the unforeseen circumstances exception, the statute reads: "An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period." 29 U.S.C. § 2102(b)(3). If the all-or-nothing rule is truly being adopted by the majority, it is creating a conflict with the Eighth Circuit, see *Burnsides v. MJ Optical, Inc.*, 128 F.3d 700, 704 (1997) (finding that the "unforeseeable business circumstances defense still requires [an] employer to give as much notice of closing as practicable once [the] causal event becomes known"), and the opinion should be circulated under Circuit Rule 40(e). The Third and Fifth Circuits also appear to be on the side of the Eighth on this issue. The Third Circuit has written that "in the event that an unforeseeable business circumstance arises, the notice period may be reduced or eliminated." *Hotel Employees and Rest. Employees Intern. Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 187 (3d Cir. 1999). Although the Fifth Circuit in *Halkias v. General Dynamics*

Corp., 137 F.3d 333, 336 (5th Cir. 1998), afforded the employer a week to provide notice once the probability of the mass layoff became foreseeable, it did so only because it accepted that the employer provided as much notice as was practicable.

The crucial date under the WARN Act is not the date when the company *knows* that a mass layoff is imminent, nor is it the date when the company finally gets around to identifying the exact employees affected by the mass layoff. The Act states plainly that the trigger date is the date when a mass layoff is "reasonably foreseeable." As soon as it is probable that a mass layoff will occur, the employer must provide notice as soon as is practicable. Here, Andersen knew of the indictment on March 1, yet it waited over five weeks before providing any notice to its employees.

This is not a trivial point for the employees concerned. Under my view of the statute, Roquet should have received notice on March 1 (which, obviously, is less than 60 days prior to her actual date of layoff, April 23) or very shortly thereafter. Under the most conservative approach I can imagine, she should have received notice on March 14, when the indictment was unsealed and the hemorrhaging began. (Given the majority's disposition, there is no need to resolve which date is correct; I would remand this question as well to the district court). Using March 1, her notice was 38 days late; using March 14, it was 25 days late. She should receive compensation for that time period. For other employees, the time periods between date of notice and date of layoff will differ, depending on when they actually lost their jobs. Robinson stayed for five weeks after April 8; a full 60 days' notice would have been possible for her.

The majority worries that giving the required WARN Act notice might exacerbate problems for a floundering company. While this may be true, the fact is that Congress weighed the interests of companies and workers in the statute, and it drew the 60-day line we have. Companies can protect themselves to a certain degree in the wording of the notices they give. As I stated above, the company need not be able to identify each affected employee by name; a general notice, alerting the employees as a group to the possibility of a layoff, is what the statute requires. Finally, at least on the present facts, Andersen's troubles were not exactly a state secret. There was nothing left to hide after March 14, when the indictment hit the front pages of the country's newspapers. By March 1, it was reasonably foreseeable to the firm that it would need to reduce its staff drastically.

For these reasons, I would reverse and remand for further proceedings. I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NANCY J. ROQUET and CORETTA ROBINSON,	)	
Plaintiffs,	)	**No. 02 C 2689**
v.	)	**Judge John W. Darrah**
ARTHUR ANDERSEN LLP,	)	
Defendant.	)	

AMENDED MEMORANDUM OPINION AND ORDER

Plaintiffs, Nancy J. Roquet and Coretta Robinson, brought a class action suit against Defendant, Arthur Andersen LLP, alleging Defendant violated the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101-2109. On May 22, 2003, Plaintiffs' Cross-Motion for Partial Summary Judgment on the Issue of Existence of Mass Layoff was granted. On August 12, 2003, Plaintiffs' Renewed Motion for Class Certification was granted. Presently before the Court are the parties' cross-motions for summary judgment on the unforeseen circumstances exception to liability under the WARN Act.

The Warn Act requires sixty days' notice before a mass layoff, 28 U.S.C. § 2102(a); in this case, by February 22, 2203 [sic] (Def.'s 56.1(a)(3) Statement ¶ 15). The unforeseen circumstances exception reduces or eliminates the Warn Act's sixty-day notice if the mass layoff is "caused by

business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A).

Andersen was engaged in the business of accounting, auditing and tax services, and speciality [sic] consulting in various locations in the United States.[1] (Plaint.'s 56.1(a)(3) Statement ¶ 1). Nancy Roquet was an employee of Andersen from January 7, 2002 to April 24, 2002, at which time her employment was terminated. (Id., ¶ 2). Coretta Robinson was an employee of Andersen from October 6, 1997 to May 15, 2002, at which time her employment was terminated. (Id., ¶ 3).

In June 2001, Andersen entered into an agreement with the United States Securities Exchange, consenting to the entry of a permanent injunction enjoining it from violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10B05 thereunder. (Plaint.'s 56.1(a)(3) Statement ¶ 10). The agreement also required Andersen to pay a $7 million fine. (Id., ¶ 11). Andersen also agreed to allow the Securities & Exchange Commission ("SEC") to enter an order pursuant to Rule 102(e), censuring Andersen for unprofessional conduct. (Id., ¶ 12). The basis for the consent decree was the SEC's finding that Andersen had knowingly or recklessly issued false and misleading, unqualified audit reports on the annual financial statement

[1] The underlying facts are fully set forth in this Court's previous dispositions addressing the Defendant's Motion to Dismiss, Defendant's Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Partial Summary Judgment on the Issue of Existence of Mass Layoff. Accordingly, they need not be repeated here; and only those facts relevant to the issue of the existence of the unforeseen circumstances exception are included.

between 1993 and 1996 for Waste Management, Inc. (Id., ¶ 13).

In November 2001, there were discussions in the media that Andersen might be and was the subject of an SEC investigation in relation to its client Enron Corporation. (Plaint.'s 56.1(a)(3) Statement ¶¶ 14-15). In December 2001, the media was reporting that experts were speculating that Andersen might not survive the SEC's investigation. (Id., ¶ 16). In January 2002, the media reported that Andersen had announced that some of its employees had disposed of or deleted a number of documents related to Enron. (Id., ¶ 17).

Initially, Andersen seeks to strike Plaintiffs' Statements of Undisputed Facts that are based on media reports, including newspapers and radio, because such statements are based on inadmissible hearsay.

Evidence submitted for or in opposition to a motion for summary judgment must be admissible at trial under the Federal Rules of Evidence. *See Stinnett v. Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir. 2002). "[H]earsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (*Eisenstadt*). Hearsay consists of an out-of-court statement offered to prove the truth of the matter asserted. *See* Fed.R.Evid. 802; *Eisenstadt*, 113 F.3d at 742. Media reports, including newspaper articles, that are being offered for the truth of the matter asserted are inadmissible hearsay and cannot be relied upon for summary judgment proceedings. *See Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 654 (7th Cir. 2001); *Eisenstadt*, 113 F.3d at 742. Plaintiffs concede that

the media reports would generally be considered hearsay but contend that they are admissible because they are not being offered for the truth of the matters asserted but rather to demonstrate constructive knowledge to Andersen of the grounds for a criminal indictment in the early part of 2002. Accordingly, the media reports will be considered only for that limited purpose, *i.e.*, evidence of what was being reported in the media concerning Andersen but not for the truth of the contents of the media reports.

Beginning in January 2002, media outlets were reporting that some of Andersen's employees were concerned about layoffs. (Id., ¶ 19). It was also reported that some of Andersen's clients were contemplating switching or had decided to switch to other auditors. (Id., ¶ 20).

As of January 2002, Andersen employed approximately 27,000 persons at over 80 locations throughout the United States. (Def.'s Additional Facts ¶ 5). As of this date, Andersen provided services to clients throughout the United States with annual revenues of about $4 to $4.5 billion. (Id., ¶ 9).

As of February 22, 2002, Andersen representatives were continuing to work with the representatives of the SEC and the Department of Justice ("DOJ") in an attempt to agree upon a global resolution of Enron Corporation-related issues. Such resolution would not have included the return of criminal charges against Andersen. (Def.'s Additional Facts ¶ 3). As of February 22, 2002, the Andersen Administrative Board did not believe that criminal charges against Andersen were probable and expected that a conclusion of matters with the SEC and DOJ would not result in substantial damage to the financial integrity of Andersen. No consideration was being given, at that time,

to the termination of large numbers of employees because there was no reason to believe that the workforce needed to be downsized. (Id., ¶ 4). As of February 22, 2002, the energies of the Andersen Administrative Board were directed primarily toward resolving the legal problems of Andersen and keeping client service teams in place with ongoing work for clients. (Id., ¶ 6). As of February 2002, the role of Andersen as a major provider of administrative support services to the Andersen network was intact or "business as usual." (Id., ¶ 7). As of February 22, 2002, Andersen had no factual basis for expecting an indictment was probable, and, if so, when an indictment would occur, and, if so, which and how many clients would withdraw their business and when such clients would withdraw their business. Accordingly, as of February 22, 2002, the extent and identification of persons or groups that would be necessary to layoff 60 days later because of the business damage from the March 14, 2002 indictment would have been pure guesswork based on what was known by or on February 22, 2002. (Def.'s 56.1(a)(3) Statement ¶ 15).

Between January 1, 2002 and March 14, 2002, only four major clients, other than Enron, had left Andersen with a revenue loss of less than $20 million annually. Andersen's client engagements and retention was in normal limits in keeping with general business conditions; and as of mid-February, almost all clients were still being served. (Def.'s Additional Facts ¶ 6).

On March 1, 2002, the DOJ informed Andersen that it intended to seek an indictment against the firm. This development was a surprise to the Andersen Administrative Board. After March 1, 2002 and through March 13, 2002, discussions occurred on an ongoing basis between Andersen and the DOJ for the purpose of attempting to

resolve issues without an indictment of Andersen and a public trial. On March 5, 2002, counsel for Andersen sent a correspondence to the DOJ stating, in pertinent part, "As we have explained to DOJ's investigative team during the last ten days . . . a criminal action by DOJ against Andersen will cause the rapid collapse of the firm." (Plaint.'s Additional Facts ¶ 41). On March 7, 2002, Andersen Country Managing Partner, Terry Hatchett, sent a communication to all United States Andersen personnel stating, in part, that no final conclusions had been reached concerning the negotiations with the DOJ. (Def.'s 56.1(a)(3) Statement ¶ 15).

On March 14, 2002, the United States DOJ unsealed an indictment charging Andersen with obstruction of justice. (Plaint.'s 56.1(a)(3) Statement ¶ 22). According to the indictment, on or about and between October 10, 2001 and November 9, 2001, Andersen knowingly and corruptly persuaded and attempted to persuade others to withhold documents and alter, destroy, mutilate, and conceal objects. (Id., ¶ 23).

On March 31, 2002, the Andersen Administrative Board decided that severe business conditions resulting from the firm's indictment announced on March 14, 2002, required a large layoff of several thousand employees throughout the United States, effective as soon as local management could perform the necessary review of employee's needs at each employment site, with a target date of April 8, 2002, for the layoffs. (Def.'s 56.1(a)(3) Statement ¶ 13). The business conditions that caused the layoffs included huge client losses between March 15 and March 31, 2002 that accounted for more than $400 million annually in revenues; and many additional client losses were considered to be imminent. Also, on March 28, 2002,

Andersen announced that, effective April 2, 2002, the non-United States participants in the Andersen network reduced payments to Andersen for administrative support services by more than 60%. Furthermore, Andersen announced that these support functions were expected to be eliminated entirely within a few months. Andersen attributes these losses to the indictment of Andersen announced on March 14, 2002, arising from the destruction of some of Andersen's documents relating to its work for Enron. (Def.'s 56.1(a)(3) Statement ¶ 14.)

In the period between January 1, 2002 and March 2002, client losses amounted to approximately $5 million annualized, or about 1 to 1-1/2% of annual revenues for the office. However, between March 15, 2002 and March 31, 2002, losses of client business serviced by or out of the Chicago practice group at 33 West Monroe Street amounted to approximately $57 million annualized, or 14% of total annual fees for that office. This was consistent with the losses already being experienced throughout the rest of the United States. (Def.'s 56.1(a)(3) Statement ¶ 16). Based on the acute amount of client losses having occurred between March 15 and March 31, 2002, and further projected client losses, the Chicago practice group was evaluated/analyzed by management to determine, in light of projected continuing client work and transition needs for departing clients, which employees to retain and which to immediately terminate. Similarly, management in the 33 West Monroe Street employee group, which was performing administrative support services only for the Andersen United States operations, identified its personnel as either needed or no longer needed in light of client losses throughout the United States. (Id., ¶ 17). This evaluation was done as quickly as possible by involved

management personnel at several levels; and termination lists, which were subject to many changes from March 31, 2002 to approximately April 5, 2002, were finalized by April 5, 2002, or on the following weekend, to be announced on April 8 or 9, 2002. (Id., ¶ 18).

Because payments for administrative support services to Andersen had been reduced immediately by more than 60% and were to fully phase out over a period of several months, Andersen's function in providing services to the participants in the Andersen network was immediately and drastically reduced. (Def.'s 56.1(a)(3) Statement ¶ 20). These immediate reductions in functions, and payments for those functions, caused the jobs of many employees who had been performing these functions to be immediately eliminated so Andersen was immediately overstaffed at the St. Charles and North Michigan Avenue facilities. (Id., ¶ 21). Commencing with the decision to cut services from Andersen for the benefit of other participants in the Andersen network and reduce payments for such services to Andersen, local management at the St. Charles and North Michigan Avenue facilities began the process of deciding which Andersen employees must be immediately terminated and which and how many should be temporarily retained for what work was anticipated and for possible eventual transition to other participants in the Andersen network. (Id., ¶ 22).

The process of determining who to immediately terminate involved reviews of the records of employees, the jobs they were currently doing, their job skills, and trying to match those skills with what was expected to be temporarily left of functions to be performed at each of these locations for the remaining member firms, including the function of transition activities. (Def.'s 56.1(a)(3)

Statement ¶ 23). As to the United States support personnel, the evaluation/analysis process was done as quickly as possible by involved management personnel at several levels. Termination lists which were subject to many changes between March 28 to April 5, 2002, were finalized by April 5, 2002, or on the following weekend, to be announced on April 8 or 9, 2002. (Id., ¶ 24).

On or about April 8, 2002, notices were sent to a number of Andersen's employees, notifying each employee that his or her employment would be terminated at a future date, after a specific period of continued employment and "job search" time. (Plaint's 56.1(a)(3) Statement ¶ 4). These notices of termination were sent to employees at three Illinois job sites: 33 West Monroe Street and 225 North Michigan Avenue in Chicago and Andersen's training facility in St. Charles, Illinois. (Id., ¶ 5). Each employee who received a notice of termination on or after April 8, 2002, was given at least two weeks of paid "job search" time. (Id., ¶ 6).

The April 2002 layoffs at the 33 West Monroe Street site were caused by a loss of client business of approximately $50 billion in revenue that occurred in the Chicago practice between March 15-31, 2002. (Def.'s Additional Facts ¶ 1). The layoffs at the North Michigan Avenue and St. Charles sites were caused by Andersen's worldwide network of affiliated firms' "pulling the plug," on March 28, 2002, on Andersen's being their major supplier of administrative support services. (Id., ¶ 2).

The WARN Act requires some employers of 100 or more full-time employees to give at least sixty days' advance written notice of plant closings and mass layoffs to affected employees. 28 U.S.C. § 2102(a). As noted above,

this Court has previously determined that the reduction in force on April 8, 2002, at the three Illinois job sites was a mass layoff, as defined by the WARN Act. It is undisputed that Andersen did not give employees terminated during the mass layoff sixty days' prior notice. The single remaining issue is whether the WARN Act's sixty-day notice is either reduced or eliminated because the mass layoff was "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Here, the inquiry is whether the business circumstances that caused the mass layoff were reasonably foreseeable on or before February 22, 2002.

Whether this provision, generally known as the "unforeseeable business circumstance exception," applies requires a two-step analysis: causation and foreseeability. *See Jurcev v. Central Comm. Hosp.*, 7 F.3d 618, 622-24 (7th Cir. 1993). The provision is narrowly construed, and the employer relying on the provision bears the burden of persuasion. *See Local Union 7107 v. Clinchfield Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997) (*Clinchfield*); *Pena v. American Meat Packing Corp.*, 258 F. Supp. 2d 864, 871 (N.D. Ill. 2003) (*Pena*).

CAUSATION

Plaintiffs argue that the causes of the mass layoff were multiple and preceded the announcement of the indictment, including Andersen's destruction of documents between October 10 and November 9, 2001, the publicity surrounding Andersen's destruction of documents beginning on January 10, 2002, and Andersen's consequent loss of clients to competitors. Andersen argues that the publication

of the indictment on March 14, 2002, caused the mass layoff because it was only after this time that Andersen lost a substantial number of clients and was no longer operating within normal business ranges.

Andersen concedes that it was common knowledge in January and February of 2002 that some of Andersen's employees had been involved in the destruction of Enron-related documents, that Andersen was under investigation by the DOJ, and that an indictment might be returned as a result thereof. However, during this time period, which was prior to the publication of the indictment, the undisputed facts show that Andersen had lost only a small portion of its business, that Andersen was operating within the normal business ranges, and that Andersen continued to provide support services for Andersen's worldwide network. There is no evidence of the final dramatic downturn prior to the announcement of the indictment. Rather, the facts are decidedly to the contrary. As such, the evidence clearly demonstrates that it was only after the publication of the indictment that Andersen lost a substantial portion of its client base, that Andersen was no longer operating within normal ranges of business, and that Andersen could no longer provide support service for Andersen's worldwide network.

FORESEEABILITY

Andersen has shown that the cause of the mass layoffs was the announcement of the indictment on March 14, 2002. Andersen must also show that the announcement of the indictment was "not reasonably foreseeable" on February 22, 2002, the undisputed date on which notice of the mass layoff would have otherwise been required. *See*

29 U.S.C. § 2101(b)(2)(A). "An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1). "The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." 20 C.F.R. § 639.9(b)(2).

Plaintiffs argue that the indictment and resulting loss of business were reasonably foreseeable by Andersen on February 22, 2002, because Andersen knew there was a likelihood of an indictment in light of the destruction of documents and Andersen's attempts to dissuade the DOJ from bringing the indictment. Specifically, Plaintiffs refer to correspondence by Andersen's counsel of March 5, 2002, set out above, which refers to Andersen's representations to the DOJ investigations "within the last 10 days" predicting an indictment of Andersen would cause Andersen's collapse. However, assuming this letter demonstrates an awareness by Andersen of the loss of business in the catastrophic amount which later occurred, the letter refers to a period of time beginning the day after February 22, 2002.

Defendant further argues that the indictment and resulting loss of business were not reasonably foreseeable on February 22, 2002, because as of February 22, 2002, the DOJ had not yet decided if it was going to seek an indictment and Andersen had not suffered significant business loss and was operating "business as usual." In other words, while the possibility of an indictment existed,

if and when such an indictment would be filed and against whom, and which clients and how many would react to the indictment would have been guesswork by Andersen. "[T]the [sic] WARN Act deals in probabilities, not possibilities." *Pena*, 258 F. Supp. 2d at 873, citing *Halkias v. General Dynamics Corp.*, 137 F.3d 333, 336 (5th Cir. 1998) (*Halkias*).

Generally, even if an employer is aware that an event might occur that would cause a business to shut down, such an event may still be deemed sudden, dramatic or unexpected. *See Pena*, 258 F. Supp. 2d at 873. In *Jurcev*, the court found that even though the employer "had long been aware" of the events that led to the cause of the closure the cause was still sudden, dramatic, and unexpected. *See Jurcev*, 7 F.3d at 626; *see also Clinchfield*, 124 F.3d at 641-42 (despite ongoing contractual problems with employer's primary purchaser of coal, employer could not foresee sixty days in advance that coal purchaser would offer a purchase price that was economically impossible for the employer to accept); *Hotel Employees & Restaurant Employees Int'l Union Local 54 v. Elsinore Shore Assoc.*, 173 F.3d 175, 186 (3rd Cir. 1999) (*Elsinore*) (despite ongoing disputes with the Casino Control Commission and the possibility that the Commission could close the employer, Commission's closure of the employer was not reasonably foreseeable); *Halkias*, 137 F.3d at 337; *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1062-63 (8th Cir. 1996) (*Loehrer*) (employer's awareness of possibility that contract would be cancelled did not make subsequent cancellation of contract a foreseeable probability).

In the instant case, prior to February 22, 2002, Andersen, as well as the general public, including Andersen's clients, was aware of the 2001 Waste Management consent decree, that Andersen was alleged to have destroyed

documents in relation to its client Enron, that the DOJ was investigating Andersen, that the possibility of an indictment existed, and that an indictment would likely have major negative effects on Andersen's viability as a company. However, at this time, Andersen was operating within the normal ranges of its business.

Although Andersen's counsel met with the DOJ on February 22, 2002, there were no pertinent facts that Andersen learned as to whether the DOJ was going to seek or file an indictment or when, if ever, an indictment might be returned. It was only on March 1, 2002, that the DOJ informed Andersen of its intent to indict Andersen as a company.

Based on the above undisputed facts, the possibility of an indictment existed as of February 22, 2002. However, if an indictment would be filed, when it would be filed, and how long it would take for clients to react to the filing of the indictment were unknown; and there is no evidence supporting the claim that as of February 22, 2002, the mere possibility of the indictment became a reasonable probability. "[J]ust because additional administrative action was *possible* . . . did not make it *probable* that closure would occur when it did . . . Similarily [sic], just because [a business] was on notice that there were problems at the plant, did not make it foreseeable that it would shut down *when it did.*" *Pena*, 258 F. Supp. 2d at 873-74 (citations omitted, emphasis in original).

Plaintiffs rely upon *Carpenters Dist. Council of New Orleans v. Dillard*, 15 F.3d 1275 (5th Cir. 1994) (*Dillard*). In *Dillard*, the Court held that the merger of two companies which caused the mass layoff was not unforeseeable to the corporations that were promoting and working

toward the merger. *Dillard*, 15 F.3d at 1282. Here, in contrast, Andersen had no control over the return of the indictment which caused the mass layoff and, in fact, had attempted to prevent the DOJ from doing so.

In *Jurcev*, the court held that a foundation's decision to discontinue support of the defendant hospital which caused the mass layoff was beyond the hospital's control. *See Jurcev*, 7 F.3d at 625. "An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition *outside the employer's control*." 20 C.F.R. § 639.9(b)(1) (emphasis added). As in *Jurcev*, the ultimate decision of the DOJ to indict Andersen *as an entity*, which caused the mass layoff, was completely beyond the control of Andersen.

Finally, a determination of the foreseeability of the causal business circumstances must consider the reasonableness of Andersen's business judgment in context with the relevant facts. "The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." 20 C.F.R. § 639.9(b)(2). To hold that Andersen should have given Section 2102(a) notice by February 22, 2002, weeks before the full extent of the consequences of the indictment became known at the end of March 2002, would not be consistent with the exercise of commercially reasonable business judgment.

Based on the above, the undisputed facts establish that the April 8, 2002 mass layoffs were not reasonably foreseeable by Andersen. Accordingly, Andersen is not

liable under the WARN Act. Plaintiffs' Motion for Summary Judgment is denied. Defendant's Motion for Summary Judgment is granted.

Dated: March 22, 2004

/s/ John W. Darrah
JOHN W. DARRAH
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2005

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Nos. 04-1616 & 04-1838

NANCY J. ROQUET and CORETTA ROBINSON,

Plaintiffs-Appellants, Cross-Appellees,

v.

ARTHUR ANDERSEN L.L.P.,

Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 02 C 2689

John W. Darrah, *Judge.*

ORDER

The appellants filed a petition for rehearing and a petition for rehearing *en banc* on February 23, 2005. By a 2 to 1 vote (Judge Wood dissenting), the petition for rehearing is denied. No judge called for a vote on the petition for rehearing *en banc*, so it is also denied.

APPENDIX D

UNITED STATES CODE ANNOTATED
TITLE 29 LABOR
CHAPTER 23 – WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

29 U.S.C. § 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions

As used in this chapter –

(1) the term "employer" means any business enterprise that employs –

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which –

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for –

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing

notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff –

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

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29 U.S.C. § 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order –

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State or entity designated by the State to carry out rapid response activities under section 2864(a)(2)(A) of this title, and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless –

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment

losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

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29 U.S.C. § 2103. Exemptions

This chapter shall not apply to a plant closing or mass layoff if –

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act [29 U.S.C.A. § 151 et seq.]: Provided, That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

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29 U.S.C. § 2104. Administration and enforcement of requirements

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for –

(A) back pay for each day of violation at a rate of compensation not less than the higher of –

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by –

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or

payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies

The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

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29 U.S.C. § 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

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29 U.S.C. § 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

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29 U.S.C. § 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

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29 U.S.C. § 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C.A. § 151 et seq.] or the Railway Labor Act [45 U.S.C.A. § 151 et seq.].

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29 U.S.C. § 2109. Report on employment and international competitiveness

Two years after August 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

APPENDIX E

CODE OF FEDERAL REGULATIONS
TITLE 20 – EMPLOYEES' BENEFITS
CHAPTER V – EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR
PART 639 – WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

20 C.F.R. § 639.1 Purpose and scope.

(a) Purpose of WARN. The **Worker Adjustment** and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(b) Scope of these regulations. These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rulemaking cannot address the multitude of industry and company-specific situations in which advance notice will be given.

(c) Notice encouraged where not required. Section 7 of the Act states:

> It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(d) WARN enforcement. Enforcement of WARN will be through the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of § 3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide assistance in understanding these regulations and may revise them from time to time as may be necessary.

(e) Notice in ambiguous situations. It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

(f) Coordination with job placement and retraining programs. The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA)

and Economic Dislocation and **Worker Adjustment** Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice begins the process of assisting workers who will be dislocated.

(g) WARN not to supersede other laws and contracts. The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

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20 C.F.R. § 639.2 What does WARN require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

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20 C.F.R. § 639.3 Definitions.

(a) Employer.

(1) The term "employer" means any business enterprise that employs –

(i) 100 or more employees, excluding part-time employees; or

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate

employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

(3) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an employer.

(4) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one "employer", the auto maker.

(b) Plant closing. The term "plant closing" means the permanent or temporary shutdown of a "single site of employment", or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of "employment loss."

(c) Mass layoff.

(1) The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during any 30-day period for:

(i) At least 33 percent of the active employees, excluding part-time employees, and

(ii) At least 50 employees, excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice.

(d) Representative. The term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act.

(e) Affected employees. The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term "affected employees" includes managerial and supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) Employment loss.

(1) The term "employment loss" means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment

does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff –

(i) The employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A "relocation or consolidation" of part or all of an employer's business, for purposes of paragraph § 639.3(h)(4), means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff.

(g) Unit of local government. The term "unit of local government" means any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more than one unit of local government, the employer must give notice to the unit to which it determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes

directly paid to the local government should be aggregated for this purpose.

(h) Part-time employee. The term "part-time" employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

(i) Single site of employment.

(1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example

is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).

(8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

(j) Facility or operating unit. The term "facility" refers to a building or buildings. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

(k) State dislocated worker unit. The term "State dislocated worker unit" means a unit designated or created in each State by the Governor under title III of the Job Training Partnership Act, as amended by EDWAA.

(l) State. For the purpose of WARN, the term "State" includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

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20 C.F.R. § 639.4 Who must give notice?

Section 3(a) of WARN states that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order * * *." Therefore, an employer who is anticipating carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. (See definitions in § 639.3 of this part.)

(a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site

plant manager, the local personnel director or a labor relations officer.

(b) An employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to

affected employees or their representative(s), if a mass layoff or plant closing is planned.

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20 C.F.R. § 639.5 When must notice be given?

(a) General rule.

(1) With certain exceptions discussed in paragraphs (b), (c) and (d) of this section and in § 639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should –

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under section 3(d) to give notice if the employer demonstrates

that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this "snapshot" of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) Transfers.

(1) Notice is not required in certain cases involving transfers, as described under the definition of "employment loss" at § 639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a "transfer" if the new job constitutes a constructive discharge.

(3) The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining what is a "reasonable commuting

distance", consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period may have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) Temporary employment.

(1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN.

(4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a long-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.

(d) Strikes or lockouts. The statute provides an exemption for strikes and lockouts which are not intended to evade the requirements of the Act. A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this

exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. Non-striking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice; however, situations in which a strike or lockout affects non-striking employees at the same plant may constitute an unforeseeable business circumstance, as discussed in § 639.9, and reduced notice may apply. Similarly, the "faltering company" exception, also discussed in § 639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, non-strikers includes the non-striking bargaining unit(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closings or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exception to 60 days' notice also may apply to these closings or layoffs at other plants.

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20 C.F.R. § 639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at

that time, to each affected employee. Notice also must be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that "any person who is an employee of the seller (other than a parttime employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale." This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.

(a) Representative(s) of affected employees. Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) Affected employees. Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While

part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice.

(c) State dislocated worker unit. Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker unit until such time as the Governor makes public State procedures for serving notice to this unit.

(d) Chief elected official of the unit of local government. The identity of the chief elected official will vary according to the local government structure. In the case of elected boards, the notice is to be served upon the board's chairperson.

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20 C.F.R. § 639.7 What must the notice contain?

(a) Notice must be specific.

(1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed in § 639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the

consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and

the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of a company official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(e) The notices separately provided to the State dislocated worker unit and to the chief elected official of the unit of local government are to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation, and the anticipated schedule for making separations;

(4) The job titles of positions to be affected, and the number of affected employees in each job classification;

(5) An indication as to whether or not bumping rights exist;

(6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

The notice may include additional information useful to the employees such as a statement of whether the planned action is expected to be temporary and, if so, its expected duration.

(f) As an alternative to the notices outlined in paragraph (e) above, an employer may give notice to the State dislocated worker unit and to the unit of local government by providing them with a written notice stating the name of address of the employment site where the plant closing or mass layoff will occur; the name and telephone number of a company official to contact for further information; the expected date of the first separation; and the number of affected employees. The employer is required to maintain the other information listed in § 639.7(e) on site and readily accessible to the State dislocated worker unit and to the unit of general local government. Should this information not be available when requested, it will be deemed a failure to give required notice.

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20 C.F.R. § 639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under § 639.6 of this part which is designed to ensure receipt of notice of least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

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20 C.F.R. § 639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, non-represented employees, the State dislocated worker unit, and the unit of local government and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7.

(a) The exception under section 3(b)(1) of WARN, termed "faltering company", applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception:

(1) An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

(2) There must have been a realistic opportunity to obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

(b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

(c) The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

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20 C.F.R. § 639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in § 639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§ 639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather

than give specific notice as required by WARN, is not acceptable.